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In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

THOMAS L. SUTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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In the Supreme Court of the United States

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THE UNITED STATES, PETITIONER

v.

THOMAS L. SUTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 12, 1957.

OPINION BELOW

The opinion of the Court of Claims in this case (R. 31–35) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1957. On October 9, 1957, the time within which to petition for a writ of certiorari was extended by order of the Chief Justice to and including November 19, 1957. This Court's jurisdiction is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to determine, *de novo* or by review, that an officer was incapacitated at the time of his release from active duty, when the appropriate military department has determined that he was not so incapacitated and is therefore not entitled to disability retired pay.

2. Whether, assuming, *arguendo,* that the court below can properly make such a determination, a claim for disability retired pay accrues at the time of release from active duty and becomes barred by the statute of limitations (28 U. S. C. 2501) six years thereafter.

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix B, *infra,* pp. 39–45.

STATEMENT

Respondent Suter, who had had prior peacetime service, served as a flying officer in the Army Air Forces during World War II. During his wartime service he developed some deafness and was hospitalized (App. A, *infra,* pp. 26–31). Because of this illness, he was directed to appear before an Army Retiring Board to determine whether he should be retired for disability or retained on active duty.[1] At the Board

[1] The Board was convened under R. S. 1246 (10 U. S. C. (1946 ed.) 961). Reserve officers were given the rights of regulars to disability retirement procedures and pay (*e. g.*, 10 U. S. C. (1946 ed.) 931, 933, 934, 961, 964, 965, 971) by Section 5 of the Act of April 3, 1939, 53 Stat. 557 (10 U. S. C. (1952 ed.) 456) as implemented by Executive Order No. 8461 of June 28, 1940.

hearing held on March 22, 1946, Suter testified that he desired immediate release from the Army since he had obtained civilian employment, and that he did not desire to remain on active duty in a limited duty status (App. A, *infra*, pp. 30–31). The Board, finding itself unable to determine the permanence of his loss of hearing, recommended that Suter serve on temporary limited duty for a period of six months and then be reexamined (App. A, *infra*, p. 32). However, on March 26, 1946, Suter was released from active duty not by reason of physical disability (App. A, *infra*, p. 32). The immediate release, rather than assignment to six months limited duty, was observed by the court below to have been the result of Suter's own choice (App. A, *infra*, p. 24).

In December 1946 and again in January 1948, Suter was examined at Army hospitals (App. A, *infra*, pp. 33–34); neither of these examinations resulted in any change of status. The Veterans Administration examined Suter in 1948 and at this time, two years after his release from active duty, awarded him disability compensation for a 40% loss in hearing (App. A, *infra*, p. 34). In 1951, Suter again sought disability retirement but was erroneously told that, due to a change in the law, his claim could not be considered (App. A, *infra*, pp. 23, 36). Suter then applied, in May 1953, seven years after his release from active duty, to the Air Force Board for the Correction of Military Records[2] for a correction of his military record to

[2] Established pursuant to Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837 (5 U. S. C. 191a), now codified as 10 U. S. C. (1952 ed., Supp. IV) 1552.

show that he was, at the time of his release in March 1946, incapacitated by reason of deafness and thus entitled to receive disability retired pay (App. A, *infra,* p. 36). The Board, in 1954, denied his application (App. A, *infra,* p. 37).

More than eight years after his release from active duty, Suter, on June 29, 1954, brought suit in the Court of Claims for disability retired pay from the date of his release (March 26, 1946) until such date as judgment might be entered (R. 1, 9; App. A, *infra,* pp. 25, 26). After trial, the Court of Claims overturned the military determinations and adjudged Suter to have been disabled at the time of his release in 1946; the court gave him judgment for disability retired pay from the date of his release from the Army in 1946 (App. A, *infra,* pp. 21–25). Judge Laramore dissented, reasoning that, since a cause of action must first accrue when the officer was released from active duty, the complaint, filed in 1954 and relating to a 1946 release from duty, was barred by the six year statute of limitations applicable to suits in the Court of Claims, 28 U. S. C. 2501 (App. A, *infra,* pp. 25–26).

REASONS FOR GRANTING THE WRIT

This is the first occasion which the Government has had to bring before this Court a significant new rule of law, in the area of the status of military personnel, which the Court of Claims has been declaring for the past decade and which we believe to run directly counter to principles established by this Court, as well as to interfere with the settled authority of the armed services to make binding determinations

in their own sphere. The court below has been asserting jurisdiction to determine for itself, on the basis of the individual facts, whether military personnel were or were not fit for active duty, and whether they should or should not have been retired for disability. As a result of this novel assumption of jurisdiction, a mass of new claims have been filed in the Court of Claims in the past few years, and court trials of physical fitness for military service have now to be held. The issue of that tribunal's power in this field warrants consideration and determination by this Court, both to correct the erroneous rule which the court has been following and also to furnish needed guide-lines in the exercise of the court's important function of adjudicating military pay claims against the Government.

I

1. In 1861, with the enactment of the first military retirement pay system,[3] Congress committed to the armed forces and the President[4] the function and duty of determining the physical qualifications of officers for active service or retirement for disability.[5]

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[3] 56 Cong. Globe 161–162.

[4] R. S. 1250 (10 U. S. C. (1946 ed.) 965) called for the transmission of retiring board decisions to the President for his approval or disapproval and orders in the case. See *Updegraff* v. *Talbott*, 221 F. 2d 342 (C. A. 4). The necessity of Presidential action was removed, after Suter's release from the Army, by Section 402 of the Career Compensation Act of 1949, 63 Stat. 816 (37 U. S. C. (1952 ed.) 272) which vested sole discretion on questions of disability and incapacity in the Secretaries of the armed services.

[5] R. S. 1245–1250, 1253, from the Act of August 3, 1861, 12 Stat. 289.

Since then, it has uniformly been held, until recently, that the courts lack jurisdiction to review factual determinations on these matters. This Court had occasion to consider the question in 1910 in *Reaves* v. *Ainsworth,* 219 U. S. 296, where an officer claimed that, as one physically disabled in line of duty, he was entitled to be retired with pay instead of being discharged. Holding that the officer was not entitled to judicial relief, the Court stated (219 U. S. at 306):

> If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

The problem was again considered by the Court in *Denby* v. *Berry,* 263 U. S. 29, where an officer disabled in line of duty contended that he was by statute[*] entitled to be retired with pay and that the courts should secure him this right. The officer was denied relief, the Court holding: "The right is one dependent by statute on the judgment of the President and *not on that of the courts.*" 263 U. S. at 38

[*] R. S. 1455, the Navy counterpart of R. S. 1253.

(emphasis added). See, also, *Creary* v. *Weeks*, 259 U. S. 336; *French* v. *Weeks*, 259 U. S. 326.

The reasons for this rule are plain. Congress has charged the military with the task of passing upon the physical capacity for active duty of its own officers.[7] In performing this task, the military must decide not only whether, as a matter of fact, the officer is disabled but also whether, despite his disability, his retention is necessary for the good of the service.[8] Thus, necessarily, the determination of an officer's status involves consideration of a multitude of factors, all within the peculiar competence and concern of the military, and not within the competence of the courts. "The courts are not the only instrumentalities of government. They can not command or regulate the Army." *Reaves* v. *Ainsworth*, *supra*, at p. 306.

2. Despite this clear rule that the military's treatment of officers on matters of fitness and classification, and retirement for disability, is not for the judiciary, the court below, in 1948, found power in itself to inquire into, review, and reverse a military determination that an officer was not incapacitated

[7] R. S. 1245; Section 402 of the Career Compensation Act of 1949, 63 Stat. 816. The Congressional purpose in establishing the disability retirement procedure is stated at 56 Cong. Globe 161–162.

[8] In *Reaves* v. *Ainsworth*, 219 U. S. 296, 306, the Court noted: "To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army."

at the time of his release.[9] The effect of this novel and erroneous ruling, together with the recent and unwarranted enlargement of the six-year statute of limitations (28 U. S. C. 2501) created by the court below (see *infra*, pp. 16–19), has been the institution of a large number of suits in the Court of Claims to review and reverse military findings of non-disability made as long ago as 1945.[10] The instant case, the first of these retirement pay cases in which the claimant has obtained judgment, affords the Government its initial opportunity to bring the matter before this Court.

The means by which the court below has been asserting this jurisdiction to supervise the military in the purely internal task of determining the fitness of officers is through the rubric of reviewing

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[9] *Lemly* v. *United States*, 109 C. Cls. 760 (opinion overruling the Government's demurrer and ordering the case to be tried). Trial on the merits in the *Lemly* case resulted in judgment for the Government, 117 C. Cls. 365, and, hence, the Government could not petition for certiorari. In the first *Lemly* hearing, the Government argued that *Denby* v. *Berry*, *supra*, compelled the conclusion that the Court of Claims was without jurisdiction. The court below ruled to the contrary, reading this Court's decision in the *Denby* case as amounting to no more than a holding that the officer had not exhausted his rights under the retirement statutes. 109 C. Cls. at 766.

[10] See, *e. g.*, *Girault* v. *United States*, 133 C. Cls. 135; *Constantine* v. *United States*, 131 C. Cls. 662; *Furlong* v. *United States*, 152 F. Supp. 238 (C. Cls.); *Rosnick* v. *United States*, 132 C. Cls. 1; *San Millan* v. *United States*, 153 F. Supp. 370 (C. Cls.); *Proper* v. *United States*, C. Cls., No. 203-54, decided July 12, 1957; *Uhley* v. *United States*, 147 F. Supp. 497 (C. Cls.); *Daridheiser* v. *United States*, C. Cls. No. 387-54, decided July 12, 1957. See also footnote 22, *infra*, p. 16, for the statistics on the current cases.

alleged "arbitrary and capricious" factual decisions by the military authorities.[11] In addition, the court has not even limited itself to a review of the proceed-

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[11] See, *e. g.*, *San Millan* v. *United States*, 153 F. Supp. 370, 376 (C. Cls.); *Proper* v. *United States*, C. Cls. No. 203–54, decided July 12, 1957, slip op., p. 1; *Furlong* v. *United States*, 152 F. Supp. 238 (C. Cls.); findings in the instant case (App. A, *infra*, p. 38).

In *Lemly* v. *United States*, 109 C. Cls. 760, *supra*, the court determined it possessed jurisdiction because the right to retirement is founded on statute. All of the rights of military personnel to pay and to retirement are, of course, ultimately dependent upon statute. But the mere fact that they are so dependent cannot supply jurisdiction where, for sound reason, none can exist. *Denby* v. *Berry*, 263 U. S. 29, 38. Cf., *Gully* v. *First National Bank*, 299 U. S. 109, and cases there cited on the question whether the presence of a federal statute is sufficient to confer jurisdiction under 28 U. S. C. 1331. No more supportable are the court's assertions that it had jurisdiction to grant a judgment for disability retired pay in the case of *Proper* v. *United States*, C. Cls. No. 203–54, also decided July 12, 1957, and in the case at bar because in its opinion a "mistake of law" had been committed. No mistake of law—except in the sense of a possible "arbitrary and capricious" determination of the particular facts—could have been committed in these cases but, assuming it had been, this Court held in *Denby* v. *Berry*, *supra*, that this would be no ground for relief. 263 U. S. at 36.

Inconsistently, the Court of Claims has also said, recently, that it cannot "undertake to determine who is fit or unfit to serve in the military forces." In *Wales* v. *United States*, 132 C. Cls. 765, the court said (at p. 769):

"The Medical Board found that plaintiff was fit for general military duty at the time of his release by the Secretary to inactive duty. This finding still stands. This court can not undertake to determine who is fit or unfit to serve in the military forces. *Holliday* v. *United States* [128 C. Cls. 647]. *Beamish* v. *United States*, 130 C. Cls. 767, 128 F. Supp. 158. And, as stated in *Orloff* v. *Willoughby*, 345 U. S. 83:

"'* * * judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as

ings before the military boards. It has recently held that, in its consideration of military findings of non-disability, it will hear the opinions of physicians who neither examined the officer at the time of his release nor appeared before a military board.[12] This means that in cases which should properly be dismissed for lack of jurisdiction the Government must now proceed to a trial on the merits and be met with the opinions and surmises of the claimant's physicians based on physical examinations made long after the claimant's release from the service. Further, the court has lately said that where the Veterans Administration, in its entirely different system of compensation, has, years after the officer's release, granted him disability compensation, it is error for the military to have, years before at the time of his release, denied him retirement for disability.[13] In effect, the court now determines for itself the issue of disability and fitness for continued service.

3. These new positions of the Court of Claims not only contravene this Court's prior rulings and that court's own earlier decisions; they also disregard the

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the Army must be scrupulous not to intervene in judicial matters.' "

The instant decision, and *Proper* v. *United States*, decided the same day, indicate that the court has now definitely chosen to follow the *Lemly* principle, rather than that of *Wales*.

[12] *San Millan* v. *United States*, *supra*, p. 375.

[13] In the instant case, the court below concluded (App. A, *infra*, p. 25) that, since Suter was rated 100% disabled by the Veterans Administration in 1952, he must have been permanently disabled six years before, in 1946. See, also, *Proper* v. *United States*, *supra*, slip op., p. 5. This is contrary to earlier holdings of the court below, *e. g.*, *Beamish* v. *United States*, 130 C. Cls. 767.

mandate of Congress. It may fairly be presumed that Congress was aware of, and views as correct, the prior holdings by this Court, and the many comparable holdings by lower federal courts. From 1861 until 1944, no substantial change was made in the military retired pay statutes.[14] When modification and development of the retired pay system became necessary, Congress again declined to provide for judicial review. Instead, exclusive military control over questions of status was retained. In 1944, Congress enacted Section 302 of the Servicemen's Readjustment Act of 1944, 58 Stat. 287 (38 U. S. C. 693i) authorizing the Secretaries of the military services (and not the courts) to establish boards (the Disability Review Boards) to review, at the request of any officer retired or released without pay for physical disability, the findings and decision of the retiring board which released him. In 1946, by Section 207 of the Legislative Reorganization Act of 1946,

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[14] The language of the earlier retirement pay statutes, R. S. 1245–1250, is of the kind which has always been held to confer unreviewable discretion: "A retiring board *may* inquire into and determine the facts * * *" (R. S. 1248) (emphasis added); "When a retiring board *finds* * * *" (R. S. 1251) (emphasis added); "When the board *finds* an officer incapacitated for active service, it shall also find and report the cause whi , *in its judgment*, has produced his incapacity * * *" (R. S. 1249) (emphasis added). See also: "*Provided further*, That at the end of a five-year period during which the name of a member is carried on a temporary disability retired list, *the Secretary concerned shall make a final determination* of such member's case and shall cause such member to be retired, separated, or treated as provided in Section 405 of this title" (Section 402 of the Career Compensation Act of 1949, 63 Stat. 816) (emphasis added).

60 Stat. 837 (5 U. S. C. 191a),[15] Congress provided, again in lieu of judicial review, for the establishment of Boards for the Correction of Military Records which, with the approval of the Secretary of the military arm concerned, could change any military record to correct an error or to remove an injustice. The legislative purpose in establishing the Correction Board procedure was to relieve Congress of "some of its burdens with respect to the consideration of private bills,"[16] and it was to this end that the jurisdiction of the boards was made virtually limitless. The scope of legislatively sanctioned action which the Secretary, acting through a Correction Board, may take—changing a retiring board's finding of no disability, determining that an officer was commissioned two years longer than he in fact held a commission, changing efficiency reports, modifying statements of pre-induction physical examinations, wiping out official reprimands, or backdating a promotion[17]—in itself indicates that Congress intended the Board procedure to stand in lieu of recourse to Congress for relief by private bill or of recourse to the courts, including the Court of Claims.

Far from taking the creation of Boards for the Correction of Military Records as further proof of Congress' belief that the courts have no function to

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[15] Now codified as 10 U. S. C. (1952 ed., Supp. IV) 1552.

[16] S. Rep. 923, 82nd Cong., 1st Sess., p. 2; H. Rep. 449, 82nd Cong., 1st Sess. See the discussion in the Brief for the Respondent, pp. 34 *ff.*, in Nos. 80 and 141, this Term, *Harmon* v. *Brucker* and *Abramowitz* v. *Brucker*.

[17] There is no limit on the number of factual situations which may be changed in a serviceman's record under Section 207.

perform in this area, the Court of Claims now asserts that this legislative action gave rise to jurisdiction to review, despite the fact that Section 207 of the 1946 Act provides that corrections made under it shall be "final and conclusive on all officers of the United States."[18] And the court has made successive

[18] See, *e. g.*, the opinion in the case at bar (App. A, *infra*, p. 25); *Proper* v. *United States*, C. Cls. No. 203–54, decided July 12, 1957, *Furlong* v. *United States*, 152 F. Supp. 238 (C. Cls.); *Girault* v. *United States*, 133 C. Cls. 135; *Rosnick* v. *United States*, 132 C. Cls. 1, 5. The court asserts that, if *any* branch of the military acts to create what is in the court's opinion a "manifest injustice" (*Rosnick*, *supra*), the action can be overturned. While the court has never specifically adverted to it, it may rely, for support of its asserted jurisdiction over Correction Boards, on a passage from a subcommittee hearing, quoted out of context by some claimants' attorneys (see, *e. g.*, Plaintiff's Response to Defendant's Motion to Dismiss, p. 7, in *Weiner* v. *United States*, C. Cls. No. 339–56). An amendment was proposed to Section 207 in 1951 which would authorize the Secretaries to make money settlements after the correction of a record which would entitle the serviceman to monetary benefits (*e. g.*, a correction to show service-incurred disability). Hearings on H. R. 1181 (No. 21), House Committee on Armed Services, 82nd Cong., 1st Sess. It was suggested that settlements to be made under the proposed amendment should be "final and conclusive on all officers of the Government, including review by the courts of the United States * * *." H. R. 1181, 82nd Cong., 1st Sess. This finality language relating to money settlements was stricken on the recommendation of the General Accounting Office that all money payments made by the military should remain subject to Accounting Office audit. Hearings on H. R. 1181, *supra*, pp. 366–369. H. R. 1181 went to hearing before the full Committee on Armed Services, where it was stated: "Mr. Smart: * * * When the bill was reported by the subcommittee *it was the intention of the committee that the jurisdiction over cases to correct military records and the determination of the cases on their merits be exclusive and final in the Board which made such corrections* but that the normal auditing authority

encroachments upon matters of military management—review of release from active duty not by reason of physical disability, review of Retiring Board recommendations, and review of Secretarial action after Correction Board proceedings.[19] The result has been that Congressional action designed to continue and strengthen the control by the military departments over matters of military status has been held to have had the opposite effect of enlarging the jurisdiction of the Court of Claims and of depreciating the status and functioning of the military authorities.[20]

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of the Comptroller be not disturbed. * * * The Chairman: Now, does it [the Defense Department comments on the amendments] go into the question of the finding on the merit by the Department? *That is final and conclusive?* Mr. Smart: *That is correct, sir.* The Chairman: *That is right. We want to keep it that way.* But it merely gives the Comptroller the authority to audit what? Mr. Smart: Audit the payment. * * * *So the determination of the merits as to whether or not a record should be corrected is final and conclusive by the Board.* The Chairman: *That is right.*" Full Committee Hearings, No. 27, House Committee on Armed Services, 82nd Cong., 1st Sess., pp. 600, 601 (emphasis added).

[19] In *Proper* v. *United States*, C. Cls. No. 203–54, decided July 12, 1957, the court held that the Secretary of the Army was *required* to accept the majority view of three members of the Army Correction Board, and to reject the minority view of two members, unless he could properly say that the majority view was arbitrary or capricious. This holding was made in the face of the clear statutory indications, and the consistent practice, that the determination was for the Secretary to make, and that the Board is merely his adviser.

[20] From the time when Congress first made judgments of the Court of Claims final and appealable (14 Stat. 9) to meet this Court's holding in *Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697, it has consistently been held that the Court of Claims is a court of limited jurisdiction and that its jurisdic-

4. If the new rule of the court below be allowed to stand, its interference in military management of problems of status will surely have disturbing and embarrassing consequences. The military should not have to administer the disability retirement system with an eye to whether the Court of Claims would consider an officer with Paget' disease not disabled (*Lemly* v. *United States*, 117 C. Cls. 365), but an officer with partial deafness disabled, and, in neither case, consider the needs or standards of the military. If the view of a military department Secretary as to what he considers fitness for satisfactory service is to be rejected by the court after a *de novo* trial, then he has been deprived of the discretion which Congress expressly vested in him. See, *e. g.*, Section 203 (a) of the Act of June 29, 1948, 62 Stat. 1085. And although the court has not yet extended its new doctrine, its path would lead it into review, and by review, control, of all functions of the military the performance of which would in some way cause a monetary benefit to be conferred or denied.[21]

Aside from the invasion of the internal affairs of the military, there are other severe problems. Were the Court of Claims to continue to review disability status matters and to award judgments in such cases, the liability on the part of the United States would

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tion cannot be enlarged except by act of Congress. *Kendall* v. *United States*, 107 U. S. 123; *United States* v. *Sherwood*, 312 U. S. 584; *Soriano* v. *United States*, 352 U. S. 270.

[21] For example, the commissioning of officers, promotions, the awarding of certain medals, possibly even the appointment to staff positions.

be very great. We can make no accurate estimate of the potential liability but, on the assumption of jurisdiction and with the eradication of the statute of limitations and the running back of judgments to the date of release (see *infra*, pp. 16–19), the present potential liability can be conservatively estimated at 25 million dollars. These same factors cause the Government to be confronted by the very real possibility of a mass of litigation—suits by officers who claim to have been disabled when released. This body of litigation, even were it to be largely unsuccessful for the claimants, would be very costly in terms of the time and money required for its defense.[22] The issue is thus a most appropriate one for resolution by the Court at this time.

II

In connection with its review of military determinations of disability, the Court of Claims has also extended, in the decision below, the six-year statute of limitations (28 U. S. C. 2501) far beyond its proper reach. While recognizing that an application to a Correction Board for Section 207 relief can be made years or decades after the events sought to be

[22] There are presently pending in the Court of Claims some 32 suits for disability retired pay which challenge release without entitlement to such pay. Since the *Lemly* case, there have been approximately 90 suits of this same nature filed. With the holding of the court below in *San Millan* v. *United States*, *supra*, that the court will try the issue of disability *de novo* and permitting testimony by medical witnesses, the defense of these suits becomes much more burdensome and expensive.

corrected arose,[23] the court has, despite the six-year limitations period, now held that a cause of action can arise from the Secretarially-approved denial of relief by a Correction Board.[24] As a result of these holdings, a claimant, to cite one of many examples, sued in 1956 for back pay, claiming that he was wrongfully denied a commission in 1944. Upon the filing of the Government's motion based on the statute of limitations, the claimant suspended proceedings and applied to a Correction Board for relief. When relief was denied by the board in 1957, the claimant amended his petition to claim that he was wrongfully denied relief by the Correction Board in 1957 and his suit was therefore timely.[25] Such use of Correction Board action as a device for measuring the limitations period, thus placing the running of the statute entirely within the control of the claimant, is in all respects the same as the comparable action rejected by this Court in *Soriano* v. *United States*, 352 U. S. 270. In *Soriano*, as in *Kendall* v. *United States*, 107 U. S. 123, the Court held that the court below could not "engraft [another] disability upon the statute

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[23] See *Odell* v. *United States*, 134 C. Cls. 634, 645. In proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693i. Application to the Board for the Correction of Military Records may be made within three years after date of discovery of the alleged error or injustice or ten years after the date of enactment of the statute creating that Board (1946). 5 U. S. C. 191a.

[24] See the opinion in the instant case (App. A, *infra*, p. 25); *Rosnick* v. *United States*, 132 C. Cls. 1. The *Rosnick* statement was a dictum.

[25] *Gingras* v. *United States*, C. Cls. No. 309–56.

[of limitations]", and stated that to hold that a suit could not be filed until after administrative denial of a claim by the Army Claims Service "would be a limitless extension of the period of limitation that Congress expressly provided for the prosecution of claims against the Government in the Court of Claims." 352 U. S. at pp. 273–274, 275.

The question whether an officer should have been retired for disability, assuming there is jurisdiction to inquire into it, can only be answered as of the time the officer was released without being so retired.[26] Until recently, the Court of Claims adhered in actual *decision* to the view that, unless brought within six years from the date of release without entitlement to disability retired pay, suit for such pay was time barred.[27] Now the court has held that, although the claimant was released without such entitlement more than six years before the filing of his suit, nevertheless his suit is timely, if, during the six year period prior to the filing of suit, a Board for the Correction

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[26] The court below so recognizes. App. A, *infra*, pp. 21, 24–25. *San Millan* v. *United States*, 153 F. Supp. 370, 376 (C. Cls.).

[27] There were various dicta in the opinions, and a sharp division among the judges, but the actual *holdings* accorded with the view we state in the text. See the Government's Brief in Opposition in *Barker* v. *United States*, No. 471, October Term, 1956. The confusing division within the Court of Claims on the question of the statute of limitations in these cases, culminating in the present changed view, has rendered timely claims identical with those which were dismissed a year ago as untimely. Compare the result reached in *Proper* v. *United States*, C. Cls. No. 203–54, decided July 12, 1957, with *Conlin* v. *United States*, C. Cls. No. 230–56, decided December 5, 1956.

of Military Records,[28] or the Adjutant General,[29] or a Physical Evaluation Board, or a Correction Board,[30] is alleged to have acted arbitrarily. And should the court decide, as it held here—in a suit filed in 1954—that there was arbitrary action by a board sitting in 1951 or one sitting in 1954 to consider a 1946 release from active duty, then the court awards judgment back to 1946.[31] The result of these holdings is, as we have suggested, to render nugatory the statute of limitations by placing its running within the hands of the claimant. The Government is presented with the burden of defending old claims which can be renewed, according to the view of the court below, time and again by repeated applications to military boards for relief.

CONCLUSION

Recognizing the special function of the Court of Claims in this area, the Government rarely seeks review of the large number of judgments of the court below holding that present or former members of the armed services are entitled to pay or emoluments which have been denied them administratively, despite our belief that many of these rulings of that court have been erroneous.[32] But we are convinced that the pres-

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[28] *E. g., Proper* v. *United States*, C. Cls. No. 203–54, decided July 12, 1957, slip op., p. 17.

[29] *San Millan* v. *United States*, *supra*, p. 371.

[30] As in the instant case, App. A, *infra*, p. 25.

[31] See also *Proper* v. *United States*, *supra*, slip op., p. 17.

[32] Since and including the 1950 Term, the Government has filed only four petitions for certiorari which can be classed in the military-pay field. This is only the fifth such petition in eight terms.

ent case is an exception and that we should ask for review here. The course of Court of Claims litigation which culminates in the holding below involves basic questions of jurisdiction and competence which we believe to have been wrongfully resolved by the Court of Claims, and on which that court has now made its definitive choice. Unless this assumption of jurisdiction is corrected now, the Government will be faced with what seems to us to be a burdensome, expensive, and unnecessary mass of trial litigation which has no place in the Court of Claims. Moreover, the determination of military status, a purely internal matter of great moment to the military establishments and the country, will be subject to improper and often uneven invasion. We believe, therefore, that this military-pay case is one in which certiorari is peculiarly appropriate, and review is called for at this time.

Respectfully submitted.

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NOVEMBER 1957.

APPENDIX A

In the United States Court of Claims

No. 270–54

(Decided July 12, 1957)

THOMAS L. SUTER v. THE UNITED STATES

Mr. Guy Emery for plaintiff. *Messrs. Ansell and Ansell* were on the briefs.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, an Army Reserve Officer, sues for retired pay, claiming that he was totally and permanently disabled for active duty when he was separated from active service on June 9, 1946. The history of his service and of various injuries and hospitalizations are recited in the findings of facts, and most of these events will not be discussed in this opinion.

On November 28, 1945, the plaintiff was admitted to the Walter Reed General Hospital and remained there until March 25, 1946. At the hospital he appeared before a Disposition Board on February 27, 1946. The board, consisting of two colonels and a captain, all medical officers, found that he had defective hearing, that the disability was total and permanent, that the disability was incurred in line of duty, and that the plaintiff was unfit for service. The board recommended that the plaintiff be ordered to appear before an Army Retiring Board.

The plaintiff appeared before an Army Retiring Board on March 22, 1946. Two captains, both medical officers, testified substantially in accord with what the Disposition Board had found, as stated above. The Retiring Board made the following finding:

> The Board is unable at this time to determine the permanency of Major Suter's incapacity, and the Board recommends 6 months' temporary limited service, with re-examination and revaluation at the end of that time, at a hospital specializing in deafness.

This action of the Retiring Board seems not to have been approved, or otherwise acted upon, by any higher authority. Perhaps this was because of the tentative nature of the board's action.

In the Retiring Board hearing, the plaintiff had stated that if he should be found unfit for general service, he did not desire to remain in the Army on a limited service basis. On March 23, 1946, the day after the hearing, he was ordered relieved from further observation and treatment at the hospital, and transferred to the Separation Center at Fort Meade, Maryland, for separation, not by reason of physical disability. On March 26, he was so separated.

The plaintiff undertook civilian employment, first with a commercial airline in North Africa, and later by setting up his own rare book business in Paris, France. Because of the statement of the Retiring Board quoted above, in reference to hospitalization and observation at the end of six months, the plaintiff obtained admission to a United States Army Hospital in Frankfurt, Germany, in December 1946. His admission was "for final type physical examination," and was stated to be "for the purpose of reporting to the Surgeon General." The plaintiff requested that the report of the examination be sent to the Walter Reed Hospital. The report of the examination at the hospital in Frankfurt must have been lost. At any rate we do not know what it was.

In January 1948, the plaintiff returned to the United States and obtained admission to the Walter Reed Hospital. A staff conference there recommended "a full aural rehabilitation program." About March 8, he was, upon his own request, released from the hospital so that he could return to France. In April 1948, he filed an application for compensation with the Veterans Administration in Paris, France.

On March 17, 1949, the Veterans Administration determined that the plaintiff's deafness was 40 percent disabling, and that a service-connected shoulder injury was 10 percent disabling.

In May 1949, the plaintiff returned to the United States and sought admission to the Walter Reed Hospital. He was advised in writing by the Air Force that he would be so admitted, at his own expense, "for physical evaluation, and appearance before a retiring board, if warranted," and was asked to give written notice if he desired admission on that basis. He gave that notice on May 26, 1949 and said that he would be available until June 30. He received no notice that the hospital was ready to receive him, and apparently made no inquiry as to why he did not receive such a notice. He returned to his business in Europe in the fall of 1949. He advised the Air Force that it had been "impractical" for him to remain longer in the United States.

In 1951 the plaintiff returned to the United States. The Walter Reed Hospital wrote him on April 23 that arrangements had been made for his "admittance to the hospital for observation and necessary treatment, including appearance before a medical board and, if warranted, a Physical Evaluation Board." Some two months later the plaintiff reported to the hospital, but was told that the law did not permit consideration of his retirement for physical disability. The basis for this statement was the opinion of the Comptroller General of April 25, 1951, 30 Comp. Gen. 409, in which he held, in effect, that Section 5 of the Act of April 3, 1939 (53 Stat. 555, 557), under which the plaintiff was and is claiming retirement rights, had been wholly superseded, as of October 1, 1949, by the provisions of Title IV of the Career Compensation Act of 1949 (63 Stat. 802).

In the case of *Updike* v. *United States*, 132 C. Cls. 627, this court held that the Comptroller General was mistaken in the opinion cited above. In the Comptroller General's opinion B–121663, September 14, 1956, he expressed agreement with our *Updike* decision. However, the plaintiff was not, because of the earlier opinion, given a hearing before a Physical Evaluation Board in 1951.

In 1953 the plaintiff applied to the Air Force Board for Correction of Military Records to have his record corrected to show entitlement to retired pay. The Surgeon General of the Air Force sent a memorandum to the board recom-

mending that no correction be made. The memorandum is reproduced in full in our finding number 30. It was not fair to the plaintiff. The statement that the 1946 Retiring Board "was unable to reach a conclusion" should have added that the board's uncertainty was, apparently, only on the question of the permanency of the deafness. The statement that an opportunity for re-evaluation "was subsequently provided, but was incomplete because of Major Suter's other personal requirements" did not take into consideration that the finding of the Frankfurt examination was apparently lost by the Army, that in 1949 the plaintiff came to the United States and waited around for some months awaiting the call to the hospital, which call he had been advised he would receive when his records had been collected, that in 1951 he was first promised and then denied an examination and, if appropriate, an appearance before a Physical Evaluation Board.

The Correction Board denied the plaintiff's application on the ground that "a sufficient basis for review has not been established." We suppose that the Surgeon General's memorandum had much to do with the board's conclusion.

At the plaintiff's appearance before the Retiring Board in 1946, the only evidence produced was to the effect that he was totally and permanently disabled by deafness. Two of the members of the board were medical officers and they, quite properly, reserved decision as to the permanency of the disability, recommending a later examination to see whether there was recovery, and to what extent. As is shown by our recital of events, that re-examination has never occurred. It was not the plaintiff's fault that it never occurred. When the 1946 Retiring Board recommended six-months limited duty and then a re-examination, which would have meant that the plaintiff would sit around on pay for six months, the plaintiff preferred to get out and get himself a job. A re-examination to find out whether a man is as deaf as he was six months before, and, if not, how much less or more deaf he is, would not seem to present medical problems of a high order of difficulty. If it was necessary for the plaintiff to leave his work in Europe and return to the United States for such an examination, when the Army had many well-equipped hospitals in Europe, it is not strange

that the plaintiff, a layman, would not have been aware of that necessity.

After all the occurrences of the intervening years, all that the Government knows about the plaintiff's alleged disability is that in 1946 the medical witnesses testified that he had a total and permanent service-connected disability, that the medical officers on the Retiring Board were in doubt as to its permanence, that he has never since been examined to determine that permanence for retired pay purposes, that in 1952 the Veterans Administration found him to be 100 per cent disabled by deafness, for its purposes.

We think that, in view of the refusal of a hearing in 1951 because of a mistake of law, and the refusal of a hearing in 1954 because of a recommendation of the Surgeon General based upon an unfair and inaccurate recital of the facts, the plaintiff is entitled to relief in this court. We have no power to remand the case, hence we must decide it. Our decision is that the plaintiff, when he was released from the Army in 1946, had a total and permanent service-connected disability. If the Physical Evaluation Board in 1951, or the Board for the Correction of Military Records in 1954 had so decided, and the decision had been officially approved, the plaintiff would have received his retired pay from the date of his release in 1946. Since his cause of action is based upon the failure of the first of those tribunals to decide his case at all, or upon the failure of the second to decide the case upon the evidence, we must decide the case as we think they should have decided it, and with like effect.

The plaintiff is entitled to a judgment for retired pay from the date of his release from the Army in 1946, less appropriate credit for payments which he has received from the Veterans Administration. The exact amount of the judgment will be determined in further proceedings pursuant to Rule 38 (c).

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

LARAMORE, *Judge*, dissenting:

I respectfully dissent for the reason I believe plaintiff's claim is barred by the 6-year statute of limitations, 28 U. S. C. 2501.

Plaintiff was separated from active service on June 9, 1946. He did not apply to the Air Force Board for Correction of

Military Records until 1953. We have many times held that his cause of action first accrued when he was released from active duty, and resort to the correction board would not toll the statute of limitations. *Levadi* v. *United States*, No. 431–55, decided December 5, 1956; *Barker* v. *United States*, 135 C. Cls. 42; *Rosnick* v. *United States*, 132 C. Cls. 1; *MacFarlane* v. *United States*, 134 C. Cls. 755; *Duff* v. *United States*, 133 C. Cls. 161.

Plaintiff's petition was filed June 29, 1954, more than six years thereafter.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner William E. Day, and the briefs and arguments of counsel, makes the following findings of fact:

1. The plaintiff enlisted as a flying cadet in the Air Service, Regular Army, May 29, 1920. He was honorably discharged August 17, 1921, by reason of expiration of training.

He accepted an appointment as second lieutenant, Air Service, Organized Reserve Corps, November 12, 1921, and was honorably discharged from his commission on April 21, 1925. He re-enlisted January 29, 1927, and was honorably discharged April 7, 1927. He was appointed major, Air Corps, Army of the United States, May 8, 1942, accepted the same date, and entered on extended active duty May 11, 1942. He was relieved from active duty and reverted to inactive status on June 9, 1946, by reason of demobilization.

He had the following periods of active service: Enlisted from May 29, 1920 to August 17, 1921, and from January 29, 1927 to April 7, 1927. Commissioned from July 29, 1923 to August 12, 1923; August 3 to August 17, 1924; September 1, 1924 to November 30, 1924, and from May 11, 1942 to June 9, 1946.

2. At the time the plaintiff entered upon active duty in 1942, he was in good health. On June 8, 1942, he was certified by a competent medical examiner at Bolling Field, D. C., as physically qualified for flying.

3. Although there is evidence that he had had some difficulty in hearing, due to a bombing attack in January 1943 at Algiers, Africa, it appears that by August 1943 it could not have been serious because a report of physical examination for flying dated August 24, 1943 (as a result of which

he was found physically qualified for flying duty, class I, by a board of medical officers) shows that his hearing was in all respects normal and further shows that he had denied any history of ear trouble.

4. In December 1943, the plaintiff, while at Bari, Italy, in connection with an aircraft ferrying mission, was subjected to a heavy bombing attack. His hearing was affected to the point where he could not hear. Upon reporting to the flight surgeon there, he was told that his hearing would probably return to normal in a few days. Apparently the hearing acuity in his left ear was reduced, but there is no evidence of any physical examination reflecting defective hearing until May 30, 1945, as shown in finding 6. In the meantime the plaintiff had performed flying duty in various theaters of operation. In January 1944 he left for China. Upon his arrival he was assigned at 14th Air Force Headquarters, later becoming base commander at an advance base in China. He received flying pay as a pilot during the time he was on duty in China from early January 1944 until February 1945.

5. While returning to the United States, by ship, from the duty referred to in the preceding finding, the plaintiff was thrown from a chair in which he was sitting, to the concrete deck, injuring his shoulder. Upon his arrival he went to the dispensary at Fort Hamilton, New York. X-rays were taken which were negative. He was sent home on leave for 45 days. While on leave, he came to Walter Reed General Hospital at Washington, D. C., and was given physiotherapy treatments for his shoulder, as an out-patient, from May 15 until June 11, 1945.

6. In the meantime he had had his ears examined at Bolling Field, D. C., and a loss in hearing acuity was found in both ears by tests given on May 30 and June 14, 1945.

7. He was admitted as a patient at Walter Reed General Hospital on June 15, 1945. His chief complaint then was "ache in right shoulder." He remained at the hospital for treatment of bursitis until July 16, 1945, at which time he was returned to general duty with his condition on discharge noted as improved.

8. The plaintiff then reported to the port of embarkation at New York for return to duty in China. His orders were changed and he was sent to Fort Meade, Maryland. From

there he was sent to Greensboro, North Carolina, and finally to Hondo, Texas, where as liaison officer he instructed Chinese pilots in the operation of B–24 bombers.

9. While at Hondo, Texas, he was admitted to the station hospital on November 8, 1945, on complaint of pain in his right shoulder. On November 14, 1945, he was transferred to the AAF Reg. & Conv. Hospital, San Antonio, Texas. His chief complaint then was stated to be:

> Pain, right shoulder; ear ache and deafness; especially left ear; pain and stiffness, left knee, especially in cold damp weather when the pain is severe.

His history of present illness, dated November 16, 1945, as recorded by that hospital, reads as follows:

> In January 1, 1943 in Algiers, Africa, where this officer was stationed and during a bombing raid by the Germans, a bomb exploded the concussion causing him to be thrown through the French Doors of the room, striking his right shoulder and forehead against the door of the room where he was billited [sic]. He received a slight laceration over his forehead and an injury to his right shoulder. His ears began to buzz at that time and he has continuously to the present time had difficulty hearing and has the same buzzing sounds in his ears; (16 Nov. 1945). He remained on duty and received no treatment except a small amount of idoine [sic] on his forehead laceration. His shoulder did not give him so much trouble at that time, and he thought that he had had an "uneventful recovery" from the shoulder injury.
>
> In October 1943 in Oran, Algeria (Africa), the officer started to get out of bed and when he stepped onto the floor he dislocated his left knee, three times on this occasion. He reported to the infirmary where he remained for about three days; (Infirm[ary] was located at LaSenia, AAF). His knee was bandaged with an elastic bandage and afterwards he was transferred to 7th Sta. Hosp., at Oran, Algiers. He was xrayed and received physiotherapy from 18 Oct. to 19 November 1943. He was returned to duty in November 1943.
>
> In December 1943, in a bombing raid at Bari, Italy, the officers ears were reinjured by the concussion of the numerous bombs which fell upon the air raid shelter where he was staying at that time. He received no treatment for the ears, but he had more difficulty hearing now than after the first mentioned bombing which had seemed to cause the trouble in the ears.

In April 1945 on the Tanker, Pan-Maryland, while returning to the U. S. from North Africa, while seated in the Captain's cabin in a chair at about 9:30 P. M. and the sea was unusually rough, the officer lost his balance, falling from his chair to the concrete floor striking his right shoulder, re-injuring it. On 27 April 1945 the officer was admitted to the dispensary at Fort Hamilton, New York where he had xrays made of the shoulder. He went home on Temporary Duty and while there (three miles from Walter Reed Hospital), he was treated as an out patient at the hospital. He received heat and electric treatments for the shoulder for about ten days which did not relieve the condition; also, xray treatment. This is the only treatment which the officer received at this place. On 15 June 1945 the officer entered the hospital as a patient. The above named treatments were continued during his hospital confinement. He returned to duty and started again for overseas duty but his orders were changed at Fort Totten, New York; he was retained on duty in U. S.

On 8 November 1945 the officer's shoulder, right pained so severely that he entered the station hospital at Hondo AAF where he was stationed. He had xrays made of the shoulder and left knee. He received no treatment and on 14 Nov. 1945 he was transferred to AAFPDC Reg. & Conv. Hospital for treatment, observation and/or disposition to return to proper station upon completion.

10. On November 28, 1945 the plaintiff was admitted to Walter Reed General Hospital on transfer from the AAF Reg. & Conv. Hospital on diagnosis involving his right shoulder. He was discharged from the hospital on March 25, 1946. The clinical record brief, apparently prepared on the former date, is quoted in finding 11. Final diagnosis, additional diagnoses, operations, change of status, as follows:

1. Tendonitis, moderate, supraspinatus tendon, right, secondary to injury received when thrown around in bombing raid in Algeria 1943. LOD yes. Cured.
2. Strain chronic, mild, knee, left accidentally incurred while getting out of bed in October 1943 Oran, Algeria Improved.
3. Defective hearing, mixed type, moderate bilateral. Unimproved. AD [right ear] 4/15 AS [left ear] 0/14.

11. The clinical abstract in connection with the plaintiff's hospitalization at Walter Reed General Hospital, beginning November 28, 1945, reads in pertinent part as follows:

* * * * *

Consultations: Eye, Ear, Nose and Throat examination on 8 December 1945 revealed a diagnosis of defective hearing mixed type, moderate, bilateral; hearing A. D. 4/15; audiometer 49% loss; A. S. 0/15, audiometer 72% loss. Ear, Nose and Throat Department recommended that this defective hearing was sufficient for retirement and also recommended that this man be sent to a hospital for hearing aid. Line of Duty: Yes was given.

Progress in the hospital: Patient was admitted to Walter Reed General Hospital on 28 November 1945. At that time his complaints were related to the right shoulder and to the left knee. A diagnosis of subdeltoid bursitis, right, was made and the patient was treated with x-radiation, 1200 "r" to the shoulder. Since that time the shoulder has improved and the patient does not complain of pain now. He has no muscle atrophy and his condition may be considered greatly improved if not cured. However, the patient's hearing indicated by Eye, Ear, Nose and Throat consultation shows by audiometer a 49% loss in the right ear and a 72% loss of hearing in the left ear. Patient has copies of forms 63, Physical Examination, performed in 1942 and 1943, both of which indicate no defect in hearing, hence this loss of hearing is unquestionably Line of Duty: Yes. Eye, Ear, Nose and Throat service states that this defect is sufficient for retirement and recommends that the patient should be sent to Bordon General Hospital, Oklahoma, for hearing aid. However, the patient states that he will purchase a hearing aid on his own initiative and Eye, Ear, Nose and Throat Section has agreed to this. Therefore, he will be brought before a Disposition Board with recommendation for retirement. The Air Corps Liaison Officer at Walter Reed General Hospital concurs in the disposition.

12. On February 27, 1946, plaintiff met a Disposition Board at Walter Reed General Hospital which diagnosed his case as follows:

> Defective hearing, mixed type, moderate, bilateral. Unimproved. LOD: Yes. Hearing: A. D. 4/15; A. S. 0/15.

The Board further found the plaintiff became incapacitated for military duty October 8, 1945, that the approximate date of origin of incapacity was January 1943, that the disability was incident to service, was total and permanent, and that plaintiff was unfit for service. The

Board recommended that plaintiff be ordered to appear before an Army Retiring Board. This board was composed of two colonels and a captain, all Medical Corps officers. Action by the board was approved by the commanding officer of the hospital.

13. The plaintiff appeared before an Army Retiring Board, at Walter Reed General Hospital on March 22, 1946. On this board of five were two medical officers with the rank of colonel. The plaintiff stated that he did not desire counsel. He testified concerning his defective hearing. In his testimony he was asked and answered questions as follows:

> Q. Do you desire to be relieved from active duty? Give reasons for your answer.
> A. Yes. I have employment and it is necessary that I get immediate release from the Army.
>
> Q. If the Board finds that you are not qualified for general service do you desire to remain on active duty in a limited service status?
> A. I do not.

Captain Joseph A. Buchignani of the Medical Corps testified as a medical witness. He read to the board the results of his examination of the plaintiff, stating among other things that the plaintiff was disqualified for permanent limited service, that further treatment, hospitalization or convalescence in a hospital or medical facility was not indicated, and that his audiometric loss was in the conversational range. In answer to the question "What are the defects in his ear that prevent him from hearing?", he replied:

> That is something that has not been completely determined. During this war there have been a great many cases of this type, and none, as yet, have been able to give a definite reason why. A sudden concussion causes this loss of hearing. In some of these cases they regain their hearing within 30 or 60 days, but in those cases where they do not recover after 60 days, they do not regain their hearing—according to my knowledge, experience and records that I have examined, ever get back their full hearing again.

The captain was asked the following question:

> Can you state that the defective hearing is permanent, or not?

The captain replied:

> From my experience I would say that it is permanent.

The only other medical witness, Captain Irving B. Brick of the Medical Corps, testified that he was in full agreement with the testimony of Captain Buchignani.

14. The Army Retiring Board, on March 22, 1946, made the following findings:

> The Board is unable at this time to determine the permanency of Major Suter's incapacity, and the Board recommends 6 months' temporary limited service, with re-examination and revaluation at the end of that time, at a hospital specializing in deafness.

There is no evidence in the record as to approval of the action of the Army Retiring Board by either the Commanding General, Army Air Force, the Surgeon General, the Adjutant General, or the Secretary of War.

15. The Walter Reed General Hospital records show that the plaintiff was placed on limited duty on March 25, 1946. Special Orders No. 82, dated March 23, 1946, relieved the plaintiff from further observation and treatment at Walter Reed General Hospital, and transferred him to the Separation Center at Fort Meade, Maryland, to arrive on March 25, 1946, for separation, not by reason of disability.

16. On March 26, 1946, by Paragraph 115, Special Orders 85, Third Service Command, Fort George G. Meade, the plaintiff was relieved from active duty, not for physical disability.

17. Thereafter, plaintiff undertook civilian employment with a commercial airline, acting as its director for the Algeria area, North Africa, until February 1947. In November 1947 he went to France and established himself in the rare book business.

18. In the meantime, plaintiff bore in mind the fact that the Army Retiring Board at Walter Reed General Hospital had recommended a re-examination and re-evaluation of plaintiff's hearing at the end of six months. While that recommendation was further conditioned upon (1) plaintiff's remaining on active duty, in a limited service status, and (2) re-examination "at a hospital specializing in deafness," plaintiff nevertheless, as a civilian pursuing private employment overseas, undertook to make his own arrangements looking toward further consideration of his case.

Through a rather complicated series of arrangements he requested and received orders from Headquarters, Western Base Section, U. S. Forces, European Theater, dated December 19, 1946 reading as follows:

> The following officer is placed on temporary duty to the medical section, headquarters, Frankfort, Germany for a period of approximately five days effective December 19 for the purpose of reporting to the Surgeon General, USFET. * * *
>
> Major Thomas L. Suter 010481 AC (ARC).

Plaintiff thereafter reported to a U. S. Army Hospital in Frankfurt, Germany, where he was admitted December 20, 1946 with diagnosis "No disease. Admitted for final type physical examination". He was discharged on December 23, 1946. There is no record of the result of a physical examination of plaintiff at the Frankfurt hospital, although the plaintiff had requested that the report of examination be forwarded to Walter Reed General Hospital.

19. From November 1947 to January 1948, the plaintiff was engaged in France in his own business as a dealer in rare books.

20. In January 1948 plaintiff returned to the United States and sought admission to Walter Reed General Hospital, where he was admitted and examined, upon his chief complaint of deafness. On January 29, 1948, a staff conference recommended "a full aural rehabilitation program."

21. Under "history of hearing loss" taken by a medical officer at Walter Reed General Hospital on January 22, 1948, after a full recitation of the events in plaintiff's service affecting his hearing, there occurs the following:

> He met an Army Retiring Board at Walter Reed General Hospital on 22 March 1946 at which time the board recommended 6 months temporary limited duty with re-evaluation for his deafness at the end of that time. He elected to revert to a civilian status and was readmitted to Walter Reed General Hospital as a civilian on 22 January 1948.

22. The final summary in his clinical record carried the following notation under date of April 21, 1948:

> This patient was given leave prior to taking aural rehabilitation or being issued a hearing aid. He was to return to the Aural Rehabilitation Center 1 April 1948, but so far he has not shown up. Information from his

wife indicates he probably has returned to Paris, France. The patient is being discharged under authority of paragraph 7, Walter Reed General Hospital Regulations 30–55, dated 10 February, 1948.

Plaintiff had been released upon his request about March 8, 1948, so that he could return to France.

23. On April 15, 1948, plaintiff filed an application for compensation with the Veterans Administration in Paris, France. On December 10, 1948, he was examined by Veterans Administration at the American Hospital of Paris, upon his complaint of hearing difficulty, and inability to raise his right arm above the horizontal because of pain in shoulder.

24. As a result of the above examination, plaintiff while in France received a letter from Veterans Administration, dated March 17, 1949, stating in part as follows:

> Your claim has been considered upon all the evidence of record including the report of the physical examination given December 10, 1948, and it was shown that your disability as the result of loss of hearing was service connected and disabling to a 40 percent degree from the date of your claim, April 15, 1948, and that your disability as the result of an injury to your right shoulder was service connected and disabling to a 10 percent degree from the same date.

25. In May of 1949, plaintiff visited the United States and apparently tried to enter Walter Reed General Hospital again. He was directed to the Air Force, which department, by letter dated May 16, 1949, subject: Authorization for Hospitalization, notified plaintiff as follows:

> 1. Reference is made to your recent request for appearance before an Air Force Retiring Board to determine your eligibility for retirement pay benefits.
>
> 2. In view of the circumstances in your case, it has been determined that you should be given an opportunity to enter Walter Reed General Hospital, Washington, D. C. for physical evaluation, and appearance before a retiring board, if warranted.
>
> 3. You are authorized to report by wire or letter to the Commanding General, Walter Reed General Hospital, within ten days from the date of receipt of this letter, for the purpose of making the necessary arrangements for admittance to that hospital. Action has been initiated to furnish the hospital with all pertinent medical records on file in this Headquarters. Inasmuch as the hospital commander will not grant you admittance to

the hospital until such time as the pertinent records have been assembled, it is suggested that you advise him at an early date of the location of all previous hospitalizations in Army hospitals, if any, so as to facilitate the procurement of all clinical and other medical records.

4. This authorization will be at no expense to the Government, in which case you will not be reimbursed for travel or any other expenses incurred. There will be a subsistence charge during hospitalization, which at most installations does not exceed $1.40 per day.

5. In the event you do not desire to avail yourself of this authorization, you should promptly notify this Headquarters, USAF, Director of Military Personnel, Attention: Promotions and Separations Division, Washington 25, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

Plaintiff replied to the above by letter of May 26, 1949, from Hillsboro, Virginia as follows:

SUBJECT: Authorization for Hospitalization.
To: Commanding General, Walter Reed General Hospital.

1. As directed in the 3rd paragraph of the letter dated 16 May, 1949 from the Department of the Air Force, I am reporting myself available to enter Walter Reed General Hospital for a physical examination, evaluation and reappearance before an Air Force Retirement Board, as directed by the findings of an Army Retiring Board dated 22 March, 1946.

2. The hospitalization and the discovery of a physical disability for which I was ordered before an Army Retirement Board was entirely at the Walter Reed General Hospital. The sole exception was the hospitalization I received at the 7th Station Hospital, Oran, French North Africa for a dislocation of my left knee with the resulting complications and treatment in an Infirmary, Barie, [sic] Italy, for concussion due to enemy bombardment.

3. I am awaiting your pleasure and will be available until 30 June 1949 to comply with the directions contained in the letter of 16 May, 1949.

26. Plaintiff appears to have made no further visit to Walter Reed General Hospital, nor any attempt to enter that hospital at this time, nor did he receive further orders. In the early fall of 1949 he returned to Europe to attend to his affairs there.

In October 1949, after plaintiff had returned to France, he wrote the Air Force Headquarters advising that it had

been "impractical" for him to remain longer in the United States. Plaintiff, while making his expenses on these trips, nevertheless believed he was losing valuable business in his absence. The rare book business appears to have been a highly competitive field of endeavor.

27. In 1951 plaintiff returned to the United States. By letter of April 23, 1951, addressed to him at a Washington, D. C. address, plaintiff was notified by Walter Reed General Hospital as follows:

> SUBJECT: Authorization for Hospitalization
> TO: Major Thomas L. Suter
> 27 H Street, N. W.
> Washington, D. C.
>
> 1. Arrangements have been made for your admittance to the hospital for observation and necessary treatment, including appearance before a medical board and, if warranted, a Physical Evaluation Board. Your records are now in this office.
>
> 2. Kindly notify this office at least 72 hours prior to the date of your admission.
>
> FOR THE COMMANDING GENERAL:

28. Over two months elapsed before plaintiff, on June 28, 1951, reported to Walter Reed General Hospital, where he was informed that the law then in effect would not permit consideration of his retirement for physical disability.

29. Plaintiff sometime in 1953 applied to the Air Force Board for Correction of Military Records to correct his record to show retirement on account of physical disability as of March 27, 1946.

30. On or about December 11, 1953, the Surgeon General, USAF, addressed the following memorandum opinion to the Air Force Board for Correction of Military Records:

> 1. At the time Major Suter was relieved from Active Duty he met a retiring board. The records of this Board show that it was cognizant of and evaluated all of the defects which are subsequently shown to have been present. The patient's complaints were numerous, and referable to:
>
> a. Deafness.
>
> b. Residuals of injury (bruise) to left shoulder.
>
> c. Injury to left knee, not taken up by the Board, subsequently rated zero precent [sic] by the Veterans Administration.
>
> 2. The Board was unable to reach a conclusion and recommended further trial at duty and a re-evaluation.

Since this re-evaluation was subsequently provided, but was incomplete because of Major Suter's other personal requirements, we are forced to utilize other evidence to determine whether, at the time of separation, Suter was or was not "permanently incapacitated for further military service."

3. Major Suter's statements show that subsequent to separation he made at least four transatlantic voyages and earned his living in Algiers and Paris. Based upon this it is presumed that he could have performed effective duty during this period, including overseas duty. The wearing of a hearing aid does not warrant a finding of unfitness for duty; on the contrary it rehabilitates the person for such service.

4. Therefore it is the opinion of the Surgeon General that Major Suter was not permanently physically incapacitated for military duty at the time he was separated. There is no error found in the separation processing. It is recommended that no change be made in the military records for medical reasons.

31. On January 28, 1954, the Secretary of the Air Force Board for Correction of Military Records addressed the following letter to plaintiff:

Reference is made to your request for correction of your military record, under the provision of Section 207 of the Legislative Reorganization Act of 1946, as amended by Public Law 220, 82nd Congress.

The Administrative regulations and procedures established by the Secretary of the Air Force for the guidance of this Board provide that an application may be denied where a sufficient basis for review has not been established.

I regret to advise you that a careful consideration of your military record, together with such facts as have been presented by you, fail to establish a sufficient basis for a hearing of your case by this Board. Therefore, in the absence of additional material evidence, no further action on your application is contemplated.

A copy of this letter has been sent to your counsel, The Disabled American Veterans.

BY DIRECTION OF THE CHAIRMAN

32. In March 1952 plaintiff was again examined by the Veterans Administration. At this time his shoulder and knee injuries were diagnosed as "clinically recovered", and his hearing as "nerve deafness, total, bilateral". On this basis that agency redetermined his percentage of disability

at 100 percent and plaintiff is drawing the appropriate compensation therefor.

33. In the circumstances, and in view of the fact that no re-examination of the plaintiff's condition since the Retiring Board's tentative decision in 1946 was in the plaintiff's record, the failure of the Air Force Board for Correction of Military Records to correct the plaintiff's record was arbitrary. The record should have been corrected to show that the plaintiff was incapacitated for general military service on June 9, 1946, by reason of defective hearing in both ears, which incapacity was service-connected, total and permanent.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38 (c).

APPENDIX B

R. S. 1245 (10 U. S. C. (1946 ed.) 931) provided:[1]

> * * * When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided.

R. S. 1246 (10 U. S. C. (1946 ed.) 961) provided:[2]

> * * * The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officers selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of.

R. S. 1247 (10 U. S. C. (1946 ed.) 962) provided:[3]

> * * * The members of said board shall be sworn in every case to discharge their duties honestly and impartially.

R. S. 1248 (10 U. S. C. (1946 ed.) 963) provided:[4]

> * * * A retiring board may inquire into and determine the facts touching the nature and oc-

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[1] R. S. 1245 was repealed effective October 1, 1949, by the Act of October 12, 1949, 63 Stat. 838, and replaced by Section 402 of that Act (37 U. S. C. (1952 ed.) 272) now codified as 10 U. S. C. (1952 ed., Supp. IV) 1201.

[2] Made obsolete and superseded by Section 402 of the Act of October 12, 1949, *supra*, fn. 1 (see S. Rep. 2484, 84th Cong., 2d Sess., p. 1032) and repealed by P. L. 1028, 84th Cong., 2d Sess. (Codification of Titles 10 (including 34) and 32.)

[3] See fn. 2, *supra*.

[4] See fn. 2, *supra*.

casion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

R. S. 1249 (10 U. S. C. (1946 ed.) 964) provided:[5]

> * * * When the board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of service.

R. S. 1250 (10 U. S. C. (1946 ed.) 965) provided:[6]

> * * * The proceedings and decision of the board shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case.

Section 402 of the Act of October 12, 1949, 63 Stat. 816 (37 U. S. C. (1952 ed.) 272), provided in pertinent part:[7]

> (a) Upon a determination by the Secretary concerned (1) that a member of a Regular component of the uniformed services entitled to receive basic pay, or a member of a Reserve component of the uniformed services entitled to receive basic pay who has been called or ordered to extended active duty for a period in excess of thirty days, is unfit to perform the duties of his office, rank, grade, or rating, by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or willful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that

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[5] See fn. 2, *supra*.

[6] See fn. 2, *supra*.

[7] Repealed and replaced by P. L. 1028, 84th Cong., 2d Sess. Now codified as 10 U. S. C. (1952 ed., Supp. IV) 1201.

such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration; (4) that such disability was the proximate result of the performance of active duty; and (5) that accepted medical principles indicate that such disability may be of a permanent nature, the name of such member shall be placed upon the temporary disability retired list of his service by the Secretary concerned and such member shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided,* That if condition (5) above is met by a finding that such disability is of a permanent nature, such member may be retired by the Secretary concerned and, upon retirement, shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided further,* That if condition (3) above is not met because the disability is determined to be less than 30 per centum, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 403 of this title: *Provided further,* That any disability shown to have been incurred in line of duty during a period of active service in time of war or national emergency shall be considered to be the proximate result of the performance of active duty.

* * * * *

(e) A member of the uniformed services whose name has been placed upon the temporary disability retired list of his service shall be given periodic physical examinations, not less frequent than every eighteen months to determine whether the disability for which such member was temporarily retired has

changed. If as a result of any such examinations, or upon the termination of a period of five years from the date of temporary disability retirement, it is determined (1) that the physical disability of such member is of permanent character and such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration, the name of such member shall be removed from the temporary disability retired list of his service and such member shall be permanently retired for physical disability and he shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided,* That for the purpose of computing such pay the percentage of his physical disability shall be determined as of the time of his permanent retirement; (2) that the physical disability of such member is less than 30 per centum in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration, the name of such member shall be removed from the temporary disability retired list of the service concerned, and such member may be separated from the service concerned for physical disability and upon separation shall be entitled to receive disability severance pay as prescribed in section 403 of this title: *Provided further,* That at the end of a five-year period during which the name of a member is carried on a temporary disability retired list, the Secretary concerned shall make a final determination of such member's case and shall cause such member to be retired, separated, or treated as provided in section 405 of this title.

* * * * *

Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 837, now codified as 10 U. S. C. (1952 ed., Supp. IV) 1552 provides:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

* * * * *

28 U. S. C. (Supp. IV) 2501 provides:

§ 2501. Time for filing suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

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